FILED
JAN 21 1955
HAROLD B. WILLEY, Cl

No. 561

IN THE

Supreme Court of the United States

October Term, 1954

DISTRICT OF COLUMBIA, *Petitioner*,

v.

AILEEN B. RANDLE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The official opinion of the United States Court of Appeals for the District of Columbia Circuit has not been as yet reported in either the official reports of that Court or in the Federal Reporter.

The opinion is included herein on page 13, *intra*, as the appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 10, 1954 (R. 65). The order of that Court denying (Chief Judge Stephens dissenting) the petition of the District of

Columbia for a rehearing en banc was entered December 7, 1954 (R. 66).

It is believed that this Court is vested with jurisdiction to review the judgment in question by writ of certiorari under the provisions of Title 28, Part IV, Sec. 1254(1), United States Code, as amended.

QUESTIONS PRESENTED

In the view of counsel for the petitioner, the questions presented are as follows:

PRINCIPAL QUESTION

Was it not error for the United States Court of Appeals for the District of Columbia Circuit to sustain the action of the trial court in excluding from the courtroom during the trial, on the sole ground he would give testimony in the case, an Assistant Inspector of Claims of the District of Columbia, who was there as the only representative of the defendant?

REMAINING QUESTION INVOLVED

Was it not error, in view of the decision of this Court in *District of Columbia* v. *Woodbury, infra,* for said Court of Appeals to sustain the action of the trial court in denying the motion of the District of Columbia for a directed verdict, the plaintiff having failed to prove any notice, actual or constructive, to the District of an alleged defect, said to have caused injury to the plaintiff?

STATUTES INVOLVED

There are no statutes or regulations involved.

It is believed, however, that, by reason of the fact that its representative was excluded from the courtroom during the trial of this case, the District of Columbia has been deprived

of property without due process of law under the Fifth Amendment to the Constitution of the United States, which provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Respondent (plaintiff in the trial court) sued petitioner, the District of Columbia, a municipal corporation, for personal injuries sustained by her allegedly as a result of the negligence of the municipal corporation in failing to exercise reasonable care to maintain a sidewalk in the District of Columbia in a reasonably safe condition for pedestrian use (R. 1).

The trial court, the United States District Court for the District of Columbia, had jurisdiction of the case under the provisions of Section 763 of the Revised Statutes of the District of Columbia, as amended by the Act of February 27, 1877, 19 Stat. 253, Ch. 69, Sec. 2. The United States Court of Appeals for the District of Columbia Circuit had jurisdiction over the appeal from the judgment of said District Court under provisions of Title 28, Part IV, Sec. 1291, United States Code, as amended.

Concisely, the pertinent facts of the case may be stated as follows:

Plaintiff, a female, in her complaint (R. 1, 2) and the amendment thereto (R. 3) alleged that on August 24, 1950

she fell, sustaining a broken left ankle, from which she suffered pain, incurred medical expenses and loss of salary, and demanded judgment against defendant. She charged that the fall and personal injuries were caused by her stepping upon a projecting U-shaped metal base imbedded in the sidewalk tree space located on the southeast corner of 8th Street and Independence Avenue, S. W., in the District of Columbia; that the tree space was under control of defendant; and that the fall was due to the negligence and carelessness of the defendant through its agents, servants and employees, "* * * in failing to maintain said tree space in a reasonably safe condition, in failing to remove therefrom the said metal base *which it had placed therein* and failed to remove after actual or constructive notice thereof, * * *" (R. 3, with italics supplied).

Defendant answered that the complaint failed to state a claim upon which relief could be granted, denied negligence on its part and denied any notice, actual or constructive, of the alleged defect, and asserted that plaintiff's injuries and damages, if any, were proximately caused by her own negligence or contributory negligence (R. 2, 3).

The case came on for trial and a jury having been duly impaneled and sworn, the court, over objection of the defendant, excluded from the courtroom during the trial, on the sole ground he would give testimony in the case, the Assistant Inspector of Claims of the District of Columbia, who was there as the only representative of the defendant (R. 7, 8, 9).

Plaintiff testified that about 1:00 P. M., August 24, 1950 (R. 9, 10) while walking east on the south side of Independence Avenue, S. W. (R. 10-13), with a friend (R. 18), who was on her right (R. 11), she stepped into a tree box with her left foot (R. 11). She stated further her left foot came down "half way" on a metal standard in the shape of a horseshoe which projected two or three inches above the surface of the tree box and which was obscured from her

view by grass, causing her ankle to buckle and she fell (R. 11, 13, 14) sustaining the injuries alleged in her complaint (R. 17, 18).

Through Carlo A. Maggi, a photographer, plaintiff introduced in evidence certain pictures (Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C and 4-D) (R. 22-26).

Antonio Mario Casanova Cortizas, called as a witness for plaintiff, testified that on August 24, 1950 he noticed two young ladies walking in front of him and two men on the corner of 8th and Independence Avenue, S. W.; that he saw plaintiff fall and presumed she fell in the tree box over "* * * an iron object exposed in the ground * * * about two and a half or three inches exposed from the ground. * * *" (R. 26-33).

Jessie Brook Suderman, called as a witness for the plaintiff, testified that she, in company with plaintiff, was walking on Independence Avenue, S. W., on August 24, 1950, and that at the corner of 8th Street there is a tree in the middle of the sidewalk. She said that she spoke to two gentlemen. She further stated that plaintiff was to her left and stepped on a sawed-off standard sticking up in the unpaved space around the tree and fell (R. 34-38).

Joseph Parlon, called as witness for the plaintiff, testified that he had been employed by the Department of Highways of the District of Columbia for 29 years and was trade foreman in charge of signs. He stated that the piece of metal shown in Plaintiff's Exhibit No. 4-D "looks like" the same type of pole used by the District of Columbia for stop signs and no-parking signs and that apparently it had been sawed off. He further stated that it was his practice in moving poles, to remove them if possible, but if not, to saw them off and drive them into the ground. He further testified that he had searched his records and found that only one sign had ever been installed on the southeast corner of 8th and Independence Avenue, which sign was installed in 1942. He identified that sign as the stop sign still stand-

ing and shown in a photograph of the corner, Plaintiff's Exhibit No. 2-A. He stated his records showed further that no sign had ever been taken down at the corner of 8th and Independence Avenue, S. W. (R. 38-42)

Benjamin Paul Blaine, another witness for the plaintiff, testified he was employed by the National Capital Parks, Department of Interior, and installed signs for the park police in the park area. He stated further the District puts up signs through the streets and "* * * this one particular location would come under the District government" (R. 42-43).

Oscar J. Avallone, an Assistant Inspector of Claims, Government of the District of Columbia (R. 46), called as a witness for defendant, testified that on November 22, 1950, after receiving certain information from plaintiff's attorney, he examined the tree space at 8th and Independence Avenue, S. W. (R. 50) and located a stanchion or standard in the tree space; that he took measurements and found "It protruded above the surface of the ground three quarters of an inch." (R. 51).

The defendant moved for a directed verdict at the close of the plaintiff's case (R. 44) and renewed the motion at the close of all the evidence (R. 54). Such motions were denied (R. 45, 54). Thereafter, the jury returned a verdict for the plaintiff for $5,000 (R. 61).

After the verdict of the jury, the defendant filed a motion for judgment non obstante veredicto, or, in the alternative, for a new trial (R. 4), which was denied by the trial judge (R. 5).

The District appealed to the United States Court of Appeals for the District of Columbia Circuit (R. 7).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Joint Appendix, containing those portions of the record on appeal which the parties agreed sufficiently pre-

sented the facts, consisted of 61 printed pages. The District of Columbia, as appellant, filed a brief consisting of 14 printed pages, raising three specific questions, and citing 26 cases. The appellee filed a brief consisting of 24 printed pages, and citing 28 cases and three reference books.

The principal issue raised on appeal was whether it was error for the lower court to exclude from the courtroom during the trial an Assistant Inspector of Claims for the District of Columbia, on the sole ground that he would give testimony in the case.

At the outset of the trial proceedings, counsel for the District of Columbia requested leave of the court to have an Assistant Inspector of Claims sit at counsel table with him as the District's representative in the case (R. 8). The trial court denied that request and excluded the Inspector from the courtroom on the sole ground that the rule on witnesses had been invoked and that the Inspector was subject thereto since he was to be a witness for the District of Columbia (R. 8). The defendant municipal corporation had no other representative in court to advise and consult with its counsel.

In a *per curiam* opinion consisting of four sentences and containing no citation of authority, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the trial court, saying merely that "we have carefully considered the record and find no error which seems to us sufficient to require the jury's verdict to be set aside".

The Court of Appeals did not even mention, much less specifically rule upon, any issue raised on the appeal.

It is submitted that by its affirmance of the judgment of the trial court, the United States Court of Appeals for the District of Columbia Circuit:

1. Has overruled, by implication, the rule of law established by it in *District of Columbia* v. *Flagg*, 42 App. D. C. 73, and in so doing,

2. Has deprived the District of Columbia of the due process of law guaranteed by the Fifth Amendment to the Constitution.

In *District of Columbia* v. *Flagg, supra,* the facts were analogous to those here involved. There, the trial court refused to permit the witness Bradshaw to give testimony upon the ground that he had remained in the courtroom in violation of an order of court excluding witnesses from the courtroom during the trial. The record in that case shows that there, as here, the witness was from the Office of the Inspector of Claims for the District of Columbia, and was present as the representative of the District. The Court of Appeals there said:

> "Not so important, since the evidence was perhaps cumulative, but equally erroneous, was the refusal of the court to permit the witness Bradshaw to testify, upon the ground that he had remained in the court room in violation of an order of court excluding the witnesses from the court room during the trial. It was stated at bar, and not controverted, that he was at the counsel table during the trial as the representative of the District. *It is always improper to exclude a litigant, and we think the same rule should apply to the representative of a corporation. Heaton* v. *Dennis,* 103 Tenn. 155, 52 S. W. 175; *Lenoir Car Co.* v. *Smith,* 100 Tenn. 127, 42 S. W. 879; *Cottrell* v. *Cottrell,* 81 Ind. 87 * * *." (Emphasis supplied.)

It is fundamental that a party to an action is entitled to be present in the courtroom during the trial of his cause. *Coonan* v. *Baltimore and O. R. Co.* (D. C.), 25 F. Supp. 834, 835; *Georgia R. and Banking Co.* v. *Tice, et al.,* 124 Ga. 459, 52 S. E. 916, 4 A. & E. Ann. Cas. 200; *Schneider* v. *Haas,* 14 Or. 174, 12 P. 236, 237, 58 Am. Rep. 296; *Smith* v. *Collins,* 94 Ala. 394, 10 So. 334; *Pedrow* v. *Federoff,* 77 Cal. App. 164,

247 P. 212; *Seaboard Air Line Ry.* v. *Scarborough,* 52 Fla. 425, 42 So. 706. See also 64 C. J. § 132, p. 120, and the cases there collated, and 53 Am. Jur. § 32, p. 47.

As was stated in *Larue* v. *Russell,* 26 Ind. 386, "* * * The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and it is so obviously necessary to the security of private rights, that the refusal to entertain the cause at all would scarcely be a greater error than the denial of the privilege. * * *"

It is submitted, therefore, that, in the language of Part V, Rule 19-1(b), of this Court, the United States Court of Appeals for the District of Columbia Circuit "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision".

Another important reason why this Court should review the instant case on writ of certiorari is that there appears to be a definite conflict in the decisions of the District of Columbia, Second and Eighth Circuit Courts of Appeal.

In *Chicago Great Western Ry. Co.* v. *Beecher,* 150 F. 2d 394, 399, the Eighth Circuit Court of Appeals declared, *inter alia,* that:

> "2. *The Request to Exclude Plaintiff from the Court Room.*—At the commencement of the trial counsel for the defendant requested the court to exclude the infant plaintiff from the court room during the trial. The request was denied, the court saying, 'I know of no rule of law which authorizes the court to exclude plaintiff, defendant, or any litigant from the court room'; and no authority was cited to the court in support of the request. Neither is any authority cited in the brief in this court to support defendant's contention, and we have found none. We conclude that the contention is without merit."

In *United States* v. *5 Cases, etc.*, 179 F. 2d 519, 522, the Second Circuit Court of Appeals stated:

> "Nor was there error in excluding the appellant's president from the court room. The appellant had requested that witnesses be excluded. The judge granted that request but, in effect, annexed to the grant the condition that Mr. Corrao, who was also to be a witness, should likewise be excluded. This was not, as appellant contends, the exclusion of a party; the corporation, not Mr. Corrao, was the claimant. One case has been found holding it was prejudicial error to exclude a corporation's president from the courtroom where he was charged with the duty of looking after the corporation's interest at the trial. Sherman v. Irving Merchandise Corp., Sup. App. T., 26 N. Y. S. 2d 645. That decision appears never to have been cited. As the matter is clearly procedural, we shall follow the rule of universal application in federal courts that the exclusion of witnesses from the courtroom lies within the discretion of the trial judge. See Holder v. United States, 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010; Oliver v. United States, 10 Cir., 121 F. 2d 245, 250; Mitchell v. United States, 10 Cir., 126 F. 2d 550. There was no abuse of discretion in attaching to the granting of appellant's motion to exclude witnesses the condition that the witness Corrao should also be excluded."

And, of course, the decision of the United States Court of Appeals for the District of Columbia Circuit in the instant case is not only in conflict with the decision of the United States Court of Appeals for the Eighth Circuit but its own decision in the *Flagg* case. Furthermore, the decision in *United States* v. *5 Cases*, in the Second Circuit, is in conflict with the *Flagg* case.

Incidentally, none of the Federal cases cited by the Second Circuit Court of Appeals is authority for excluding a *litigant.* However, *Sherman* v. *Irving Merchandise Corp.,* 26 N. Y. S. 2d 645, also mentioned, is authority for the rule that a corporation is entitled to have a representative present during trial and that to exclude such representative is prejudicial. See also *Hughes* v. *State,* 126 Tenn. 40, 148 S. W. 543, 555, Ann. Cas. 1913D-1262.

The importance of the proper resolution of the question to all corporations, private as well as municipal, is apparent.

The other question involved is whether the Court of Appeals in holding that it was not error for the trial court to deny the motion for a directed verdict, failed to follow the rule of substantive law laid down by the Court in *District of Columbia* v. *Woodbury,* 136 U. S. 450.

The *Woodbury* case established the principle that the District of Columbia is not an insurer of the safety of persons coming upon its streets. Its duty is only to exercise reasonable care to maintain the several parts of its streets in a reasonably safe condition for the purposes for which they are intended, and, before there can be a recovery for injuries sustained thereon, a plaintiff must show that his injuries were caused by a dangerous or defective condition of the portion of the street being used by him for its intended purpose and that the District of Columbia had notice, actual or constructive, of such condition.

The record in this case is devoid of any evidence showing notice, either actual or constructive, to the District of Columbia of the alleged defect (R. *passim*). On the contrary, appellee's witness Cortizas testified that, in all the times when he had previously seen the tree box, he never observed the stanchion (R. 32), and her witness Parlon testified that his records failed to disclose that the District of Columbia had ever placed a sign at the location of the alleged fall (R. 40). Under the facts, the decision in the *Woodbury* case warranted the direction of a verdict.

In view of the importance of the principal question involved in this case and the widespread applicability of the rule resolving that question, the writ should issue in this case.

Respectfully submitted,

VERNON E. WEST,
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Assistant Corporation Counsel, D. C.,

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District Building,
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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,081

DISTRICT OF COLUMBIA, APPELLANT

v.

AILEEN B. RANDLE, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided November 10, 1954

Mr. Harry L. Walker, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Vernon E. West,* Corporation Counsel, *Chester H. Gray,* Principal Assistant Corporation Counsel, *Milton D. Korman* and *Ralph D. Quinter, Jr.,* Assistant Corporation Counsel, were on the brief, for appellant.

Mr. Alvin L. Newmyer, Jr., with whom *Messrs. Alvin L. Newmyer* and *David M. Wortman* were on the brief, for appellee.

Before WILBUR K. MILLER, FAHY and WASHINGTON, Circuit Judges.

PER CURIUM: A jury awarded Aileen B. Randle the sum of $5,000 against the District of Columbia as damages for personal injuries alleged to have been sustained because

of the local government's failure to maintain a sidewalk in a reasonably safe condition. A metal pole or standard for a traffic sign, which had stood in the unpaved area surrounding a tree growing in the sidewalk, had been sawed off. The plaintiff's ankle was broken when she stumbled on the remaining portion of the pole or standard which was somewhat higher than the surface of the ground in which it was embedded.

On this appeal by the District we have carefully considered the record and find no error which seems to us sufficient to require the jury's verdict to be set aside.

Affirmed.

Government of the District of Columbia
OFFICE OF THE CORPORATION COUNSEL
DISTRICT BUILDING
WASHINGTON 4, D. C.

RECEIVED
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SUPREME COURT, U. S.

February 17, 1955

Honorable Harold B. Willey
Clerk
Supreme Court of the United States
Washington, D. C.

In re: District of Columbia v. Randle, No. 561,
October Term, 1954

Dear Sir:

In connection with the matter beginning with the third full paragraph on page 9 of the Petition for Writ of Certiorari in the above entitled matter, the Chief Justice and Justices may be interested in the following recently discovered matter:

In addition to the fact that there appears to be a conflict in the decisions of the District of Columbia, the Second and the Eighth Circuit Courts of Appeal, there appears to be a conflict between a decision of the Ninth Circuit Court of Appeals and one of the Sixth Circuit Court of Appeals.

In Powell v. United States, 208 F. 2d 618, 619, the Sixth Circuit Court of Appeals stated as follows:

> "Appellant contends that the District Court committed reversible error in allowing one of the government witnesses to be present in the courtroom during the presentation of the government's case and to testify as a witness after the court had granted a motion to separate the witnesses. This contention has no merit. The exclusion of witnesses from the courtroom is a matter resting in the sound discretion of the trial court and the exercise of that discretion will not be disturbed except in case of clear abuse. Leache v. State, 22 Tex. App. 279, 3 S.W. 539; 53 Am.Jur. 47. No abuse of discretion existed here for it is the uniform rule in this jurisdiction in the conduct of criminal trials that an officer in charge of the case be permitted to sit in the courtroom through the trial and to advise counsel for the government, even though he himself testifies as a witness. Hughes v. State, 126 Tenn. 10, 148 S.W. 543; State v. Ede, 167 Or. 640, 117 P.2d 235."

Thus, the decision in the case at bar is in convlict with the decisions of the Eighth Circuit in the Chicago Great Western Ry.Co. case, the decision of the District of Columbia Circuit in District of Columbia v. Flagg, and the decision in the Powell case, supra. See also and compare J. D. Charles v. United States of America (C.C.A. 9) 215 F. 2d 825.

I am enclosing ten copies of this letter for your convenience. I have forwarded a copy hereof to the attorney for the respondent in this case.

Very truly yours,

VERNON E. WEST
Corporation Counsel, D. C.

60/6

I am enclosing ten copies of that letter for your convenience. I have forwarded a copy hereof to the attorney for the respondent in this case.

Very truly yours,

JOSE M. MENDEZ
Contralor

Contraloría General
San Juan, P. R.

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DISTRICT OF COLUMBIA, *Petitioner,*

v.

AILEEN B. RANDLE, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

The alleged conflict among the Circuit Courts suggested by the Petitioner is purely imaginary, and the exclusion from the court room of one of the employees of the Corporation Counsel's office, whose only knowledge of the case was that he had taken photographs and measurements of the defect in the sidewalk involved (R. 137-139), is nothing but a red herring, which had nothing whatever to do with the merits of the controversy or the verdict of the jury. The brief opinion of the Circuit Court in the case at bar unfortunately does not detail the *ratio decidendi* of the decision; however, it must be conceded from the record and the arguments made on appeal both in the briefs and at the oral hearing that the Court held, (1) that the exclusion of the witness Avallone was not the exclusion of a party to

the litigation, and/or (2) that no prejudice was shown by his exclusion and, therefore, no reversible error was committed; and, (3) there was substantial testimony of either actual and constructive notice to the District of the defect which caused plaintiff's injury.

During a conference at the bench at the beginning of the trial, counsel for the defendant informed the Court that Mr. Avallone was going to be a witness in the case. The Court said that he would therefore be excluded from the court room. Counsel for defendant then showed the Court the opinion in the case of *District of Columbia* v. *Flagg*, 42 App. D.C. 73, and after reading that case, the Court said that it was not excluding Mr. Avallone as the District's representative but "as a witness". Neither during this discussion, nor subsequently, did defendant's counsel advise the Court what knowledge Mr. Avallone had of the case, what his testimony would be, or the necessity for his presence at the counsel table, and gave the Court no basis on which to determine that his exemption from the rule was either desirable or necessary (R. 2, 6).

The case of *District of Columbia* v. *Flagg, supra,* which Petitioner claims was not followed in the instant case, did not, as the learned Trial Judge obviously noted, involve the question of whether the exclusion of a witness' *presence* from the court room was reversible error. The Court there held that it was reversible error to exclude a particular witness' *testimony* after he had disregarded the rule against witnesses and remained in the court room. In effect, therefore, the Court held, as did this Court in the case of *Holder* v. *U.S.*, 150 U.S. 91, that the proper remedy for such action was contempt, rather than prejudicing the merits of the action by excluding important testimony. It is also noted that in the dissenting opinion in the *Flagg* case the dissenting Judge states that the witness' presence was alleged to be necessary to assist counsel in the defense, and one of the reasons for the dissent was that the

record did not support this allegation. Nor does it here.

In the case of *Powell* v. *U.S.*, (C.C.A. 6) 208 Fed. 2d 618, the Court held that it was not reversible error to permit a Government witness to testify after he had sat in the court room and assisted in the trial of the case. The case, therefore, follows the *Flagg* case and the *Holder* case, *supra*. It does not necessarily follow from any of these decisions that if the Court had excluded the *witnesses* and allowed their *testimony*, that such would be reversible error.

The case of *Chicago, Great Western Railway Company* v. *Beecher*, 150 Fed. 2d 394, decided in the 8th Circuit, and cited by Petitioner, is neither in conflict with the *Flagg* case nor the case at bar. It cites the general rule that a litigant has a right to be present at his trial, and says that no reason was shown to exclude the three-year-old infant plaintiff from the court room. The case of *Charles* v. *U.S.*, 215 Fed. 2d 825, decided in the 9th Circuit, and cited by Petitioner, follows the general rule that the exclusion of witnesses is discretionary with the Trial Judge. It holds that the District Court did not exercise any discretion in excluding witnesses from the court room but merely abandoned the rule. The Court held that this arbitrary action was error. More important, however, as in the case at bar, the Circuit Court said that the appellant was not prejudiced by this action.

The case of *U. S.* v. *5 cases*, (C.C.A. 2) 175 Fed. 2d 519, is authority in support of the decision herein. The Court there held that the exclusion of a corporation's president from the court room was not the exclusion of a party. If this be so, certainly the exclusion of a subordinate employee of the District Government is not the exclusion of a party. Although Petitioner insinuates that Mr. Avallone was the only representative who was present, it cannot seriously be argued that he was the only one who *could have been present* or who could have as-

sisted the two defense counsel at the trial (if they really needed any assistance from an Assistant Claims Inspector). We reiterate, assuming, arguendo, that the exclusion of Mr. Avallone from the court room was, in fact, the exclusion of the District Government, no prejudice to Petitioner has even yet been shown.

With respect to the remaining question involved, to which Petitioner haphazardly devotes only ten lines, it is argued that the District had no notice of this defect and that, therefore, the decision violates the principles of the case of *D. C.* v. *Woodbury,* 136 U.S. 450. The Petitioner fails to mention that the plaintiff, witness Sudermann and witness Parlon all indicated by their testimony that the sawed-off stanchion over which plaintiff fell was the exact same type of stanchion that held all of the other traffic signs on the District streets, that it was on District property, and that it was the District's practice to saw them off at the base rather than remove them completely from the ground. (R. 26, 68, 94, 108-109, 110-111, 126). This was ample to convince the jury that this was a District sign and that the District had actual notice, or should have had notice of its presence. (See *Dotey* v. *D. C.,* 25 App. D.C. 232, 236; *Brennan Construction Co.* v. *Cumberland,* 29 App. D.C. 554.) Further, the testimony showed that the natural erosion of the ground in the tree space around the stanchion caused it to protrude higher and higher until it eventually caused plaintiff's injury. Witness Cortizas stated, "Eventually, the rain was washing the ground leaving it exposed" (R. 83), and the District's own employee admitted that this erosion would take a considerable period of time (R. 110-111). This was certainly sufficient to indicate that the District had constructive notice of the presence of this obstruction and opportunity to correct it.

In conclusion, we are unable to ascertain any conflict of authorities, any important question, or any reason for

this further attempt at endless litigation of a nominal verdict in a simple personal injury case. The writ, we respectfully submit, should be denied.

Respectfully submitted,

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